No. 22348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL D. SULLIVAN,
JO ANN SULLIVAN,

Appellants,

vs.

E. W. MULLINS, JOHN K. SLOAN
AND RICHARD L. OLIVER, dba
MULLINS, SLOANE & OLIVER CO.,

Appellees.

On Appeal From the Judgment of the United States District Court for the Central District of California

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

Opinion Below

The opinion below is set forth in the Referee's Memorandum Decision (Transcript of Record, pp. 60-61) and Findings of Fact and Conclusions of Law (Transcript of Record, pp. 62-65) and Judgment and adjudication in bankruptcy (Transcript of Record, p. 66).

JURISDICTION

Appellees agree that this Court has jurisdiction to hear this matter; however, "Appeals under this Act to the United States Court of Appeals shall be taken within thirty days after written notice to the *aggrieved* party. . . ." (11 USC § 48) (Emphasis added)

Are either of the alleged bankrupts, Daniel D. Sullivan or Jo Ann Sullivan, also known as "Joe Barker", "aggrieved" by the adjudication (1) that they are indebted to petitioners in the sum of $7,908.83 (plus certain additional sums)?, and (2) that they are bankrupt? The answer to both of these questions is no, for as is shown by the Transcript of Record, pp. 94-97, the alleged bankrupts *asked that the Referee in Bankruptcy sign the Conclusions of Law which they had set forth therein.*

Included in the Conclusions of Law of alleged bankrupts were the following: "[T]herefore, lessees owe to lessors the following amounts: . . . total $7908.83" (Transcript of Record, p. 96); the bankrupts further admit that "within four months next preceding the filing of this petition, respondents and each of them did commit an act of bankruptcy . . ." (*Ibid.*) Further, the bankrupts' attorney stated that they, the alleged bankrupts, "concealed a part of their property with intent to defraud creditors" and that "respondents and each of them are bankrupt." (*Ibid.*)

In summary, appellees submit that alleged bankrupts cannot be aggrieved under Section 25 of the Bankruptcy Act (11 USC § 48) because they submitted the Findings of Fact and Conclusions of Law in which alleged bankrupts admit that they owe the monies for which petitioning creditors obtained a judgment, further admit that they transferred a property with intent to defraud credi-

tors, and further admit that they are bankrupt. Since he "who consents to an act is not wronged by it" (CAL. CIV. CODE § 3515), appellants herein are not "aggrieved," and they should not be heard on appeal.

ARGUMENT OF THE CASE

Although appellants do not list a specification of errors, the latters' "STATEMENT OF THE CASE" (Brief of Appellant, p. 2) lists two questions:

1. Did the acts of appellees in taking possession of the premises result in a termination of Appellees' (Lessors') rights under the Lease?

2. May Lessors seek damages against an evicted Lessee?

Both of these questions are discussed below.

I

DID THE ACTS OF APPELLEES IN TAKING POSSESSION OF THE PREMISES RESULT IN A TERMINATION OF APPELLEES (LESSORS) RIGHTS UNDER THE LEASE?

Appellees owned and operated a shopping center and leased one of the store buildings therein to alleged bankrupts, in which the latter conducted a coin operated laundry business. The Lessees failed to pay rent of $350.00, plus parking lot fees of $15.00 per month, due on the first day of each of the months of June, July, August, September and October, 1966. On August 5, 1966, the lessors gave notice of default for such failure, which notice contained a statement to the effect that if

default was not cured, lessors would exercise all rights granted to them under paragraph 21, entitled "Default" of the aforementioned lease.

On August 9, 1966, the lessees abandoned the premises. On August 10, 1966, lessees ordered the power company to turn off the electricity which was done August 11, 1966. On August 19, 1966, informed that the leased premises were littered with debris and in a state of disorder, lessors changed the locks on the front and back doors, and repaired the broken plate glass door; on November 1, 1966, lessors relet said premises for the sum of $300.00 per month plus $15.00 parking lot maintenance fee, or $50.00 less per month than appellants, lessees, had been paying.

To try to establish that the acts of appellees in taking possession did result from a termination, the appellants, *on appeal,* argue that appellees, on August 9, 1966, changed each lock on each laundry machine and therefore that appellees evicted the appellants from the premises. Such argument is one of fact, and neither the Findings of Fact and Conclusions of Law, nor the Referee's Memorandum Decision (Transcript of Record, pp. 51-52), nor the Referee's Certificate on Petition for Review of an Order Declaring an Alleged Bankrupt to be in Fact Bankrupt (*Id.,* 68-71), supports this contention of fact. Moreover, appellants base their appeal upon a contention of fact which was advanced at the trial level and specifically decided against appellants.

Appellants do not question the right of lessor to change the locks on the leased premises, nor the right of lessors to hold lessees for damages, once it is found that an abandonment has occurred. Since the Referee did find that the lessees had abandoned the premises

(Transcript of Record pp. 50-51) and since such abandonment is a specific breach of the Lease, (*Id.* p. 9) lessors acts in changing locks after such abandonment is not a termination of lessors rights under the lease. Lessees have not shown how such acts could constitute such a termination of rights.

II

MAY LESSORS SEEK DAMAGES FROM THE EVICTED LESSEES?

Appellees have followed the provisions of the lease, and those of Section 3308 of the Civil Code of the State of California, to establish a claim against appellants. Civil Code § 3308 provides:

> "The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.
>
> "The rights of the lessor under such agreement shall be cumulative to all other rights or remedies now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach

> of the covenant to pay such rent or charges accruing subsequent to the time of such termination. The parties to such lease may further agree therein that unless the remedy provided by this section is exercised by the lessor within a specified time the right thereto shall be barred." (CAL. CIV. CODE § 3308)

The lease between the parties, at paragraph 21, entitled "DEFAULT", contains the agreement required in the first paragraph of C.C. § 3308. (Transcript of Record pp. 10-11) The lessees were found by the trial court to be in breach, having abandoned the premises (Transcript of Record, pp. 51-52, 68-71).

The second paragraph of Civil Code § 3308 then limits the lessors to an election. The Lessors may have an immediate cause of action for damages, pursuant to the first paragraph of that section, or they may avail themselves of other remedies, but if they sue for damages under the first paragraph of Civil Code § 3308, they lose whatever *other* remedies they may have had. Appellees seek only the damages as provided by the first paragraph of said statute, but appellants contend that, having evicted the lessees, lessors may not then sue for damages — the *eviction* being an election (Brief of Appellants, p. 6). Such a construction completely ignores the remedy afforded by the first paragraph of Civil Code § 3308.

At page 11 of their Brief, Appellants contend: "Appellees as landlords did not give the required notice to appellants." (Brief of Appellants, p. 11) Appellants do not state what is "required" in a notice, but only that lessors' notice was not sufficient to give the appellees the right to relet the premises, to relet the premises for a different rental, or to relet the premises for a term beyond the original term without giving the lessees notice of the lessors' intention to do so.

It may be seen that paragraph 21 of the lease between the parties provides that lessors may have each and every one of the aforementioned rights and may exercise the same without an intention to do so. Still, on August 5, 1966, lessors sent certain letters, one to Mr. Daniel Sullivan, alleged bankrupt, and one to the attorneys for the alleged bankrupts (Transcript of Record, pp. 49-50).

> "In the absence of a contrary provision, reentry by the lessor, without notification to the tenant that he is doing so on the tenant's account, terminates the lease. *This result is avoided by the agreement that reentry shall not be so construed unless written notice of this intention is given to the tenant.* Such a provision is approved in *Brown v. Lane* (1929) 102 Cal.App. 350, 283 P. 78."
>
> (Continuing Education of the Bar, *Legal Aspects of Real Estate Transactions,* 474) (Emphasis added)

It may be seen that the lease provides that reentry shall not be construed as a termination of the lease (Transcript of Record, pp. 10-11).

If the new lessee of the premises should exercise his option, the second five-year term of said new lease would extend approximately two years beyond the original term of the lease at bar; thus, the question: Does a new lease for a potentially longer term terminate lessors' right to recover herein?

> "Appellant's second contention is that the evidence required findings to the effect that the respondent accepted his surrender of the leased premises and terminated the lease by repossessing the premises, making repairs and alterations and reletting them to new tenants *for a period extending beyond the*

expiration date of his lease. The complete lack of merit in this contention is demonstrated by the decisions in *Yates v. Reid,* 36 Cal.2d 383 [224 P.2d 8] and *Narcisi v. Reed,* 107 Cal.App.2d 586 [237 P.2d 558]. Both the last cited decisions recognize the rule that ordinarily a reletting or any act inconsistent with the rights of the tenant under the lease amounts to an election to terminate the existing lease. They hold, however, that the lease may be so drawn as to contain provisions by which the application of that rule is avoided. . . . "

(Wiese v. Steinauer, 201 Cal.App.2d 651, 657)
(Emphasis by the court)

Since the lease between the parties also contains a right to alter the premises and to relet them for a period extending beyond the expiration of the original lease (Transcript of Record, pp. 10-11), this argument of appellants must also fail.

SUMMARY

Appellees respectfully submit that the acts of lessors in taking possession of abandoned premises did not constitute a termination of all of their rights under their lease with alleged bankrupts, and, further, that the provisions of Section 3308 of the Civil Code of the State of California afford to lessors their cause of action, and thus their claim, for liquidated damages under the Bankruptcy Act.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By GEORGE H. ELLIS

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